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AttorneysforPlaintiff
IRETAIRBY

UNITEDSTATESDISTRICTCOURT
NORTHERNDISTRICTOFCALIFORNIA
SANFRANCISCODIVISION

IRETAIRBY,

Plaintiff,

vs.

BROOKSHENDERSONHADEN,

Defendant.

CaseNo.:3:08C-80004MISC-PJH

**DECLARATIONOFRHONDAL.
NELSONINSUPPORTOF:**

**IRETAIRBY'S SUPPLEMENTAL
OPPOSITIONTOMOTIONTO
VACATEJUDGMENTANDFOR
PERMANENTINJUNCTION AGAINST
ENFORCEMENTOFTEXAS
JUDGMENTINCALIFORNIA**

HearingDate:May14,2008
Time:9:00a.m.
Dept.:3
Judge:PhyllisJ.Hamilton

I,RhondaL.Nelson,declareandstate:

1. I am an attorney at law, licensed to practice before the bar of this Court, and a member of the law firm of Severson & Werson, attorneys for Plaintiff in this action. I make this declaration in support of the Opposition to the Motion to Vacate Judgment and for Permanent Injunction against Enforcement of Texas Judgment in California. As a result, I have personal and firsthand knowledge of the facts stated herein and if called to testify could do so competently.

2. On February 13, 1997, Ireta Irby ("Irby") filed a Complaint against Brooks Henderson Haden ("Haden") the Complaint for Determination of Dischargeability ("Complaint"). A true and

1 correct copy of the Non dischargeability Complaint is attached hereto as Exhibit "A." On
 2 January 29, 2008, Irby filed against Haden the First Amended Complaint for Determination of
 3 Dischargeability of Debt ("Amended Complaint"). A true and correct copy of the First Amended
 4 Complaint is attached hereto as Exhibit "B." (The Complaint and First Amended Complaint shall
 5 hereinafter be referred to collectively as the "Non dischargeability Complaint").

6 3. On April 15, 1998, the bankruptcy court filed its Memorandum Decision declaring
 7 that the Texas Judgment was non dischargeable based on fraud pursuant to Bankruptcy Code
 8 § 523(a)(2). A true and correct copy of the Memorandum Decision is attached hereto as Exhibit
 9 "C."

10 4. On April 28, 2008, the bankruptcy Court entered the Judgment
 11 ("Non dischargeability Judgment"). A true and correct copy of the Non dischargeability Judgment
 12 is attached hereto as Exhibit "D."

13 5. On May 5, 1998, Haden filed a Notice of Appeal to the Bankruptcy Appellate
 14 Panel for the Ninth Circuit ("Notice of Appeal"). A true and correct copy of the Notice of Appeal
 15 is attached hereto as Exhibit "E."

16 6. On May 27, 1998, Irby filed Plaintiff Ireta Irby's Statement of Election to Transfer
 17 the Appeal to the District Court ("Objection") objecting to the reference of the appeal to the
 18 Bankruptcy Appellate Panel. A true and correct copy of the Objection is attached hereto as
 19 Exhibit "F." The impact of the Objection was to send the appeal to the District Court.

20 7. On November 18, 1998, the District Court entered an Order Affirming Decision of
 21 the Bankruptcy Court ("Order"). A true and correct copy of the Order is attached hereto as
 22 Exhibit "G"

23 ///

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28 ///

1 I declare under penalty of perjury of the law of the United States of America that the
2 foregoing is true and correct.

3 Executed on this 28th day of April at San Francisco, California.

4
5 /s/Rhonda L. Nelson
6 RHONDAL.NELSON
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EXHIBIT A

EXHIBIT A

LOFTON, De LANCIE & NELSON
NICOLAS De LANCIE (State Bar No. 84934)
SHARON D. SILVERMAN (State Bar No. 148464)
505 Montgomery Street, Suite 1550
San Francisco, California 94111-2584
Telephone: (415) 772-1900

Attorneys for Plaintiff
IRETA IRBY

97-1034 -AJ

ADVERSARY
PLAINTIFF: Ireta Irby
DEBTOR: H. Brooks
DEFENDENT: H. Brooks
JUDGE: Hon. A. Jarslowsky

ORIGINAL FILED 02/13/97 - 2:13PM
CLERK: U.S. BANKRUPTCY COURT
NORTHERN DISTRICT OF CALIFORNIA
SANTA ROSA DIVISION
DEPUTY: lc
RECEIPT NO: 1-7-233852 \$150

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA



In re Brooks H. Haden

Case No. 96-13933 aj
Chapter 7

Ireta Irby,

Adversary No.

Plaintiff

v.

Brooks H. Haden,

Defendant

Complaint for Determination of Dischargeability

Claim for Relief

Nelwyn Ireta Irby, plaintiff herein, by Sharon D. Silverman, her undersigned
counsel, for her complaint against the defendant, alleges as follows:

1. This is a core proceeding over which this court has jurisdiction under
Title 28 U.S.C. § 157(b).

2. Defendant is the debtor in the above-captioned Chapter 7 case (the
"Case"). Defendant commenced the Case on November 14, 1996.

3. Plaintiff is a creditor of defendant.

4. This is an adversary proceeding to determine the dischargeability of
debtor's debt to plaintiff.

COPY

1 5. Defendant is indebted to plaintiff in the amount set forth below for
2 obtaining money by false pretenses, false representations and actual fraud as follows:

3 a. In February of 1987, plaintiff loaned (the "Loan") defendant
4 \$75,000.00 based on defendant's prior oral representations that (1) defendant needed the
5 Loan to pursue a business venture to take waste products from industry and make them
6 environmentally safe, and (2) the Loan was needed for a short term and would be paid back
7 to her within ninety (90) days.

8 b. Plaintiff is informed and believes, and, based thereon, alleges
9 that defendant knew, at the time of making these oral representations just prior to the Loan,
10 that such representations were false and fraudulent and were designed to obtain money from
11 plaintiff under false pretenses.

12 c. Defendant failed to inform plaintiff that her money would be at
13 risk such that she had little or no chance of receiving back her money within the ninety (90)
14 days, or ever.

15 d. Plaintiff, at the time of making the Loan, justifiably relied on
16 defendant's false oral representations, not knowing at the time that they were, in fact, false.

17 e. After making the Loan, plaintiff received a loan agreement and
18 promissory note signed by defendant and dated February 20, 1987. Contrary to the prior
19 understanding between plaintiff and defendant, such loan agreement stated that the Loan was
20 used to finance a real estate development in Dallas, Texas known as "The French Centre."
21 Both such loan agreement and promissory note stated that the Loan was due and payable
22 within ninety (90) days of the date of those documents.

23 f. On or about May 27, 1988, plaintiff caused defendant to be
24 served with a summons and complaint alleging that defendant had obtained money from
25 plaintiff through intentional and false representations. A true and correct copy of such
26 complaint is attached hereto, marked as Exhibit A.

27 g. On November 17, 1988, a default judgment (the "Judgment") in
28 plaintiff's favor was entered in the United States District Court for the Southern District of

1 Texas, Houston Division, in the amount of \$87,450.00, which included interest, attorney's
2 fees and court costs to that date. A true and correct copy of the Judgment is attached hereto,
3 marked as Exhibit B.

4 6. Defendant is now indebted to plaintiff under the Judgment in the
5 amount of \$158,726.00, consisting of the Judgment amount of \$87,450.00, plus interest
6 thereon at the legal rate of ten percent (10%) from the date thereof to the date hereof, of
7 \$72,092.34, less \$816.34 garnished from defendant's wages immediately prior to the
8 commencement of the Case. Interest at the legal rate continues to accrue on the Judgment.

9
10 Prayer

11 WHEREFORE, plaintiff prays (1) for judgment against defendant as follows:
12 that the court determine that the debt of defendant to plaintiff under the Judgment in the
13 amount of \$158,726.00 is nondischargeable pursuant to Bankruptcy Code section 523(a)(2);
14 and (2) that plaintiff have such other further relief as is just, including continuing interest on
15 the Judgment and reasonable costs and attorney's fees.

16
17 DATED: February 12, 1997

Respectfully submitted,

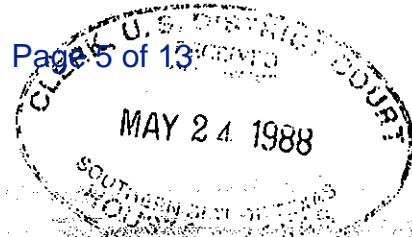
18 LOFTON, De LANCIE & NELSON

19
20 By: 

Sharon D. Silverman

21
22 Attorneys for Plaintiff
IRETA IRBY

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IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISIONIRETA IRBY
Plaintiff

VS.

BROOKS H. HADEN
DefendantX
X
X
X
X
X
X

CIVIL ACTION NO.

H-88-1781

COMPLAINT

COMES NOW the Plaintiff, IRETA IRBY and files this her Complaint complaining of BROOKS H. HADEN and for cause of action would show into the Court as follows:

1. Plaintiff is a resident citizen of Houston, Harris County, Texas where the cause of action arises. Defendant is a resident citizen of the State of Colorado. Pursuant to the Federal Rules of Civil Procedure, service of summons upon Defendant, BROOKS H. HADEN may be accomplished by service upon the Secretary of State of Texas in Austin, Travis County, Texas. The Secretary of State may then forward such summons by registered or certified mail, return receipt requested to Defendant BROOKS H. HADEN, 1324 Green Gables Court, Fort Collins, Colorado 80525.

2. Jurisdiction is founded upon diversity of citizenship and amount. The matter in controversy exceeds, exclusive of interests and costs, the sum of \$10,000.00.

3. Attached hereto is a copy of an instrument executed and delivered by Defendant. Plaintiff is the owner and holder of the instrument.




4. Defendant has defaulted in the payment of the obligation represented by the instrument. The principal balance remaining due and unpaid is \$75,000.00. Interest on the amount at the rate provided after maturity is also due as shown by the attachment hereto.

5. Though payment has often been demanded Defendant has failed to pay the indebtedness. Plaintiff has placed the matured instrument with the undersigned attorney. Under the agreement evidenced by the instrument the attorney's fees shall be a reasonable amount, but not less than 10 percent of the principal and interest then owing. Therefore, Plaintiff seeks attorney's fees in a reasonable amount.

6. In the alternative, Plaintiff alleges that on or about February 20, 1987, Defendant executed a promissory note to her in return for \$75,000.00, and intentionally and falsely represented to her that the principal would be paid on the 90th day following the date. In reliance upon this intentional false representation, Plaintiff transferred to Defendant the sum of \$75,000.00. Plaintiff has been damaged in that the sum of \$75,000.00 has never been repaid and is still due and owing. Further, Plaintiff alleges that the actions of Defendant were done with evil intent and malice in order to defraud Plaintiff of her funds. Therefore, Plaintiff seeks punitive damages of twice (2) the amount of actual damages found for Defendant's wrongful conduct.

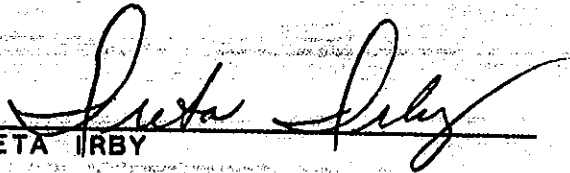
WHEREFORE, PREMISES CONSIDERED, Plaintiff prays that summons issue to Defendant and that upon final hearing hereof Plaintiff have Judgment against the Defendant as follows: a) In the sum of \$75,000.00 plus 10% interest from May 20, 1987; plus interest at the legal rate from the date of Judgment upon the Judgment amount; plus reasonable attorney's fees; plus cost of court; or b) In the alternative the sum of \$75,000.00 representing actual damages; plus punitive damages of twice (2) the sum of actual damages found by the court; plus court costs; and, c) Such other and further relief as the Court should deem just and proper.

Respectfully submitted

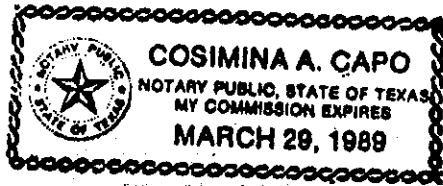

WAYNE H. PARIS
550 Westlake Park Blvd.
Suite 700
Houston, Texas 77079
(713) 558-8989
I.D. # 797
ATTORNEY FOR PLAINTIFF

THE STATE OF TEXAS X
 X
COUNTY OF HARRIS X

BEFORE ME, the undersigned authority, on this day personally appeared IRETA IRBY, who is the Plaintiff creditor and stated on her oath that the indebtedness sued upon in the principal balance herein is within her knowledge, just and true, and it is due and unpaid, and that all offsets, payments and credits have been allowed, and


IRETA IRBY

SWORN TO AND SUBSCRIBED BEFORE ME, on this 23rd day
of May, 1988.




NOTARY PUBLIC, STATE OF TEXAS

\$75,000.00

February 20, 1987

FOR VALUE RECEIVED, the undersigned (hereinafter "Maker") promises to pay to the order of IRETA IRBY ("Payee") at 22410 Greenbrook Drive, Houston, Texas, or such other place as Payee shall direct, the principal sum of SEVENTY-FIVE THOUSAND DOLLARS (\$75,000.00), without interest other than that payable if this Promissory Note is not timely paid as hereinafter provided, and other than certain stock to be paid over, transferred and delivered as set forth in a certain Agreement between the parties of even date herewith, all of which are payable on the 90th day following the date hereof.

Upon any default in making any of the payments due hereunder when same is due, and if this Note is referred to an attorney for collection, whether or not suit is actually filed, Maker will pay additionally a reasonable attorneys' fee of not less the 10% of the total amount then due hereunder, plus all other Court costs and other costs of collection. Further, if this Note not be paid when due, the unpaid principal balance shall bear interest at the highest rate permissible under law from said due date until paid, or if there be no such rate then in effect, at the rate of fifteen percent (15%) per annum.

Makers, and all endorsers, guarantors and sureties hereof waive presentment, protest, demand, and notice of protest and non-payment and agree to and waive notice of all extensions of this Note or any part thereof.

Failure of Payee or any holder hereof to exercise any of its rights hereunder at any time shall not constitute a waiver of its right to exercise such rights at any other time, as to the same or any other default or breach theretofore or thereafter occurring.

This Note shall be the joint and several obligation of Maker, and all sureties, guarantors and endorsers, and shall be binding upon them, their heirs, personal representatives and assigns.

EXHIBIT "A"

IN WITNESS WHEREOF, this Note is executed and delivered as of
this 20th day of February, 1987.

Brooks H. Haden

BROOKS H. HADEN

CLERK, U.S. DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS

FILED

11-17-88

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISIONJESSE E. CLARK, CLERK
BY DEPUTY

IRETA IRBY

VS.

BROOKS H. HADEN

X
X
X
X
X

CIVIL ACTION NO. H-88-1781

JUDGMENT

On this day came on to be heard Plaintiff's Motion for Default Judgment in the above styled cause, and it appearing to the court that Defendant, though duly summoned to appear and answer herein, has wholly failed to appear and answer herein, that appearance day for Defendant has passed, and that Plaintiff's cause of action is based upon a liquidated demand, the court finds that Plaintiff is entitled to judgment by default as prayed for.

It is ORDERED, ADJUDGED, and DECREED that Plaintiff, IRETA IRBY, recover from Defendant, BROOKS H. HADEN, Judgment in the total sum of \$87,450.00 (which includes Plaintiff's principal claim of \$75,000.00, plus pre-judgment interest on the principal claim of \$4,500.00, plus attorney's fees of \$7,950.00) together with interest at the legal rate on the total amount from the date of this Judgment until paid, and for all costs of court spent in this cause, for all of which let execution issue.

DONE at Houston, Texas this 17 day of Nov., 1988.

EXHIBIT

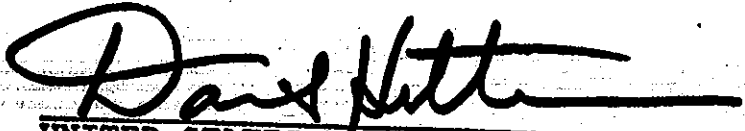
B

TRUE COPY I CERTIFY

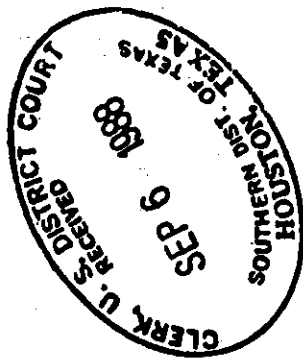
ATTEST:

MICHAEL N. MILBY, CLERK

By E. Guxman
Deputy Clerk


UNITED STATES DISTRICT JUDGE





CLERK, U. S. DISTRICT COURT
RECEIVED DOCKET SECTION
HOUSTON, TEXAS
SOUTHERN DISTRICT OF TEXAS

NOV 21 1988

1 2 3 4 5 6 PM

EXHIBIT B

EXHIBIT B

FILED
ORDER FOR RELIEF

28 JAN 29 AM 10:04

U.S. BANKRUPTCY COURT
NORTHERN DIST. OF CA.
SANTA ROSA, CA.

LOFTON, De LANCIE & NELSON
NICOLAS De LANCIE (State Bar No. 84934)
RHONDA L. NELSON (State Bar No. 116043)
505 Montgomery Street, Suite 1550
San Francisco, California 94111-2584
Telephone: (415) 772-1900

Attorneys for Plaintiff and Creditor
IRETA IRBY

UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF CALIFORNIA
SANTA ROSA DIVISION

In re
BROOKS HENDERSON HADEN,
Debtor.

IRETA IRBY,
Plaintiff,

vs.

BROOKS HENDERSON HADEN,
Defendant.

Case No. 96-13933-AJ
Chapter 7

Adversary Proceeding No. 97-1034-AJ

FIRST AMENDED COMPLAINT FOR
DETERMINATION OF DISCHARGABILITY OF DEBT

LOFTON, De LANCIE & NELSON
505 MONTGOMERY STREET, SUITE 1550
SAN FRANCISCO, CALIFORNIA 94111-2584
TELEPHONE (415) 772-1900 FACSIMILE (415) 772-1909

COPY

Ireta Irby (the "Plaintiff") complains against Brooks Henderson Haden (the "Defendant") by this First Amended Complaint for Determination of Dischargeability of Debt (this "Complaint") and alleges:

PARTIES

The Plaintiff.

1. Ireta Irby, the plaintiff herein, is—
 - a. a natural person residing in Ruston, Louisiana;
 - b. a creditor of the Defendant in the Case (defined below).

The Defendant.

2. The Plaintiff is informed and believes and, based thereon, alleges that defendant Brooks Henderson Haden is—
 - a. a natural person residing in Mill Valley, County of Marin, California;and
 - b. the debtor in that certain case (the "Case") under Chapter 7 of Title 11 of the United States Code (such title, the "Bankruptcy Code") now pending in the United States Bankruptcy Court for the Northern District of California, Santa Rosa Division (such court, this "Court"; and such district, this "District"), styled *In re Brooks Henderson Haden*, bearing case number 96-13933-AJ.

JURISDICTION, VENUE, AND CORE NATURE

3. This Court has original jurisdiction over this adversary proceeding (this "Proceeding") and the claim for relief stated herein pursuant to section 1334 of Title 28 of the United States Code (such title, the "Judicial Code").

4. Venue in this District is proper pursuant to section 1409 of the Judicial Code.

\\\\\\

5. This Proceeding is a proceeding for a determination of the dischargeability of the Debt (defined below) of the Defendant to the Plaintiff under section 523(a)(2)(A) of the Bankruptcy Code.

6. This Proceeding is a core proceeding pursuant to section 152 of the Judicial Code.

GENERAL ALLEGATIONS

7. On or about February 13, 1987, the Plaintiff loaned (the "Loan") the sum of \$75,000.00 to the Defendant by causing the Greenspoint Branch of Western Federal Savings and Loan Association, of Houston, Texas, to issue its cashier's check number 007245, dated that date, in such amount, to the order of the Defendant, and mailing such check to the Defendant. The Plaintiff paid such association the entire sum of \$75,000.00 represented by such check from her own funds.

8. Prior to the making of the Loan, the Defendant and the Plaintiff had had a personal relationship, to wit: the Defendant was dating the Plaintiff's daughter Deann, had been a frequent visitor in the Plaintiff's home during the latter part of 1986 and the first part of 1997, and had been in telephone contact with the Plaintiff during this period.

9. During his various visits to the Plaintiff's home and in his various telephone conversations with her during this period (the latter part of 1986 and the first part of 1997), the Defendant regularly discussed with the Plaintiff a business plan on which he said he had been working for three years to take industrial waste products, specifically those containing polychlorinated biphenyls ("PCB"), and make them safe. During these conversations, the Defendant told the Plaintiff that (i) he had travelled to Europe and met with several shipping companies that would be involved in this business; (ii) this business would be timely because PCB removal and environmental clean-up were currently "hot topics"; (iii) this business would help clean-up industrial waste; (iv) he had "a lot of people" interested in this business; (v) in order further to pursue this business, the Defendant needed to purchase a "shell corporation"; (vi) the cost for such purchase would be \$200,000; (vii) if the Plaintiff could loan

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1 him this sum for ninety days, she would become "equal partners" with him in this business;
 2 (viii) the return the Plaintiff could expect for loaning the Defendant money for this business
 3 would be directly related to the amount that she could loan to him; (ix) if she could only loan
 4 him a lesser amount—she had told him that she did not have \$200,000.00 to lend him, that
 5 she only had \$75,000.00, and that was not available until February 13, 1987 when certain
 6 certificates of deposit in that amount she held would be maturing—she would become a "par-
 7 tner" with him and other investors he would need to bring into the transaction in the busi-
 8 ness; (x) there would be a meeting in Dallas, Texas soon with all investors in the business to
 9 which she would be invited where "all her questions would be answered"; (xi) if the Plaintiff
 10 loaned the Defendant \$75,000.00, she would have the opportunity to make "a lot of money",
 11 enough to be able "to buy [herself] two Mercedes Benzes", she would have the opportunity to
 12 become a part of his business, and he and she would both become rich; (xii) things were
 13 "going so well for him" in this business; (xiii) his grandfather, a bishop in the Episcopal
 14 Church in Dallas, Texas, and an attorney, were also loaning him money for this business;
 15 (xiv) the Defendant would "personally guarantee" that the Plaintiff would be repaid the entire
 16 amount of the Loan within ninety days; (xv) even if the business "did not go as planned", the
 17 Loan would be repaid to the Plaintiff within ninety days; and (xvi) there was "just no way"
 18 that the Plaintiff would not be repaid the Loan.

19 10. On or about February 10, 1987, the Defendant telephoned the Plaintiff at
 20 her home and told her that "things were moving quicker than [he] had expected" and that he
 21 needed the money she had "promised" to loan him "right now". The Plaintiff reminded him
 22 that he had previously promised her that she would be invited to a meeting in Dallas, Texas
 23 with all investors in the business, but that that had not happened. He told her that that
 24 meeting—a "big" meeting—would be happening "soon", but that she needed to send him her
 25 check right away by Federal Express, although he said he could wait until February 13,
 26 1987. The Defendant repeated to the Plaintiff that even if the business "did not go as
 27 planned", the Loan would be repaid to the Plaintiff within ninety days and that there was
 28 "just no way" that the Plaintiff would not be repaid the Loan. He told her that he would be

1 sending her a promissory note for the Loan soon. The Defendant was very insistent with the
 2 Plaintiff and she agreed to send the check for the Loan when her certificates of deposit
 3 matured three days later.

4 11. In mid-March 1987, after attempting to contact the Defendant by telephone
 5 on a number of occasions since making the Loan and finally speaking to him by telephone in
 6 early March 1987, the Plaintiff received that certain Agreement and that certain Promissory
 7 Note (respectively, the "Agreement" and the "Note"), both dated February 20, 1987, made
 8 by the Defendant from the Defendant. True and correct copies of the Agreement and the
 9 Note are attached hereto, marked, respectively, as Exhibits A and B.

10 12. Both the Agreement and the Note provided that the Loan was to be repaid,
 11 without interest, ninety days after the date thereof (that is, on May 21, 1987). The Agree-
 12 ment also provided that (i) the Defendant intended to acquire substantially all of the shares
 13 (the "Cambest Shares") of Cambest, Inc., a Nevada corporation ("Cambest"); (ii) the sole
 14 use of the funds loaned by the Plaintiff was for such acquisition; (iii) there would be no other
 15 use thereof; (iv) the purpose of such acquisition was the developmment of a real estate project
 16 in Dallas, Texas; (v) the name of Cambest was contemplated to be changed to "Meyers Con-
 17 cepts International Incorporated"; (vi) ninety days after the date of the Agreement the
 18 Plaintiff would receive a certain number of the Cambest Shares, half "free trading" and the
 19 other half subject to trading restrictions under Rule 144 promulgated by the Securities and
 20 Exchange Commission (the "SEC").

21 13. In late April 1987, the Plaintiff received from the Defendant two certifi-
 22 cates, each representing 37,500 shares of the common stock of Myers Concepts International,
 23 Inc., a Utah corporation (such corporation, "Myers Utah"; and such shares, collectively, the
 24 "Myers Shares"), both of which were dated April 22, 1987, and one of which bore a restric-
 25 tive legend. True and correct copies of such certificates are attached hereto, marked, collec-
 26 tively, as Exhibit C.

27 14. The Loan was not repaid on May 21, 1987, or at any time thereafter.

28 \\\

LOFTON, DE LANCIE & NELSON

505 MONTGOMERY STREET, SUITE 1500

SAN FRANCISCO, CALIFORNIA 94111-2584

TELEPHONE (415) 774-1900 FACSIMILE (415) 774-1909

PROOF OF SERVICE BY MAIL

I, Béla Nuss, declare as follows:

I am over the age of 18 years, and not a party to this action. My business address is 505 Montgomery Street, Suite 1550, San Francisco, California 94111, which is located in the county where the mailing described below took place.

I am readily familiar with the business practice at my place of business for collection and processing of correspondence for mailing with the United States Postal Service. Correspondence so collected and processed is deposited with the United States Postal Service that same day in the ordinary course of business.

1. On January 27, 1998, at my place of business at San Francisco, California, a copy of the following document: **FIRST AMENDED COMPLAINT FOR DETERMINATION OF DISCHARGABILITY OF DEBT**, was placed in a sealed envelope, with postage fully prepaid, addressed to:

Kaipo K.B. Young, Esq.
Law Offices of Iain A. Macdonald
Two Embarcadero Center, Suite 1670
San Francisco, CA 94111-3930

and that said envelope was placed for collection and mailing on that date following ordinary business practices.

I certify and declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Executed on January 27, 1998, at San Francisco, California.



Béla Nuss

EXHIBIT C

EXHIBIT C

FILED

APR 15 1998

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

KEENAN G. CASADY, CLERK
U.S. Bankruptcy Court-Santa Rosa

In re

BROOKS H. HADEN,

No. 96-13933

Debtor.

IRETA IRBY,

Plaintiff,

v.

A.P. No. 97-1034

BROOKS H. HADEN,

Defendant.

Memorandum of Decision

In early 1987, debtor and defendant Brooks H. Haden was a 23-year-old, fresh out of college. Plaintiff Ireta Irby was a registered nurse in her fifties. They met because Haden was dating Irby's daughter.

Haden had become convinced by a third party that he could make a lot of money by investing in several business ventures. Haden was told and believed that he could raise the capital needed for these ventures by purchasing a publicly traded shell corporation, infusing the ventures into the corporation, and then borrowing money using the corporation's stock as collateral. This plan may have been a fraudulent securities scheme, but if it was Haden was clueless as to it.

Haden needed to raise around \$200,000.00 to purchase the shell corporation. Having no funds of his own, he set out to convince friends and relatives to lend him the money. Among these was Irby.

Haden told Irby that he only needed to borrow the money for 90

1 days. He believed that a lender would make a loan on the stock by
2 then which would allow him to retire the debt quickly.

3 Irby was completely unsophisticated in investment matters.
4 her entire savings was about \$100,000.00, which she kept in
5 certificates of deposit. Despite being old enough to know better,
6 she was taken in by Haden's apparent polish and sophistication
7 despite his young age. She believed Haden when he told her that
8 her loan was absolutely safe, and would be quickly repaid. He
9 told her that in addition to quick repayment, she would get shares
10 of stock which could become valuable. Haden told her that the
11 very worst scenario was that she would get her principal back and
12 make no profit. Believing him, Irby cashed in \$75,000.00 in
13 certificates of deposit and loaned the money to Haden.

14 Haden's statements to Irby were false. In fact, the loan was
15 a very risky proposition. If no bank would loan on the stock, then
16 the business ventures were dead and Haden would have no way to
17 repay the loan. That is what happened. If Irby had known the true
18 risks, she would not have loaned the money.

19 Haden has never repaid Irby. She obtained a judgment against
20 him in 1988. He filed a Chapter 7 bankruptcy petition on November
21 14, 1996. By this adversary proceeding, Irby seeks to have the
22 debt declared nondischargeable pursuant to section 523(a)(2) of the
23 Bankruptcy Code.

24 The difficult issue in this case is that of intent. Irby
25 argues that Haden was part of a larger securities fraud, but there
26 is no evidence of this. If the entire plan was a scam, Haden was
27 a dupe, not a perpetrator.

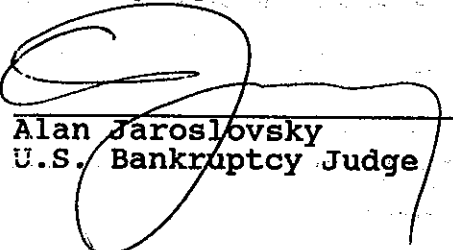
28 Haden did not set out to cheat Irby; being young and
29 inexperienced, he actually believed that he could pay Irby quickly

1 and fully intended to do so. However, in his eagerness to raise
2 the funds he needed he was not fully honest with Irby. He told her
3 that the worst that could happen was that she would only get her
4 principal back. In fact, he knew that she would not even get her
5 principal back if a bank would not loan on the corporate stock.
6 Good intentions do not excuse material misrepresentations, nor do
7 they prohibit an finding of intent to defraud. Haden used a
8 falsehood to induce Irby to loan him \$75,000.00. The court can and
9 does infer fraudulent intent from this act, despite Haden's
10 motivations.

11 For the foregoing reasons, Irby's judgment against Haden will
12 be deemed nondischargeable. She shall also recover her costs of
13 suit.

14 This memorandum constitutes the court's findings and
15 conclusions pursuant to FRCP 52(a) and FRBP 7052. Counsel for
16 Irby shall submit an appropriate form of judgment forthwith.

17 Dated: April 14, 1998


18 Alan Jaroslovsky
19 U.S. Bankruptcy Judge
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CERTIFICATE OF MAILING

The undersigned deputy clerk of the United States Bankruptcy Court for the Northern District of California hereby certifies that a copy of the attached document was mailed to all parties listed below as required by the Bankruptcy Code and Rules of Bankruptcy Procedure.

Dated: April 15, 1998


Deputy Clerk

IAIN A. MACDONALD
Two Embarcadero Center, Suite 1670
San Francisco, CA 94111-3930

LOFTON, De LANCIE & NELSON
Rhonda L. Nelson
505 Montgomery Street, Suite 1550
San Francisco, CA 94111-2584

EXHIBIT D

EXHIBIT D

1 LOFTON, De LANCIE & NELSON
NICOLAS De LANCIE (State Bar No. 84934)
2 RHONDA L. NELSON (State Bar No. 116043)
505 Montgomery Street, Suite 1550
3 San Francisco, California 94111-2584
Telephone: (415) 772-1900

ORIGINAL FILED

APR 27 1998

4 Attorneys for Plaintiff
5 IRETA IRBY

KEENAN G. CASADY, CLERK
U.S. Bankruptcy Court-Santa Rosa

6
7
8 UNITED STATES BANKRUPTCY COURT
9 NORTHERN DISTRICT OF CALIFORNIA
10 SANTA ROSA DIVISION
11

12 In re

Case No. 96-13933 AJ
Chapter 7

13 BROOKS H. HADEN,

14 Debtor.

15 IRETA IRBY,

Adversary No. 97-1034-AJ

16 Plaintiff,

17 v.

18 BROOKS H. HADEN,

19 Defendant.
20
21

22 JUDGMENT

23
24 This action came on regularly for trial on April 14, 1998, in the United States
25 Bankruptcy Court for the Northern District of California, Santa Rosa Division, the Honorable
26 Alan Jaroslovsky presiding. Rhonda L. Nelson of Lofton, De Lancie & Nelson appeared with
27 plaintiff Ireta Irby. Iain A. Macdonald and Kaipo K.B. Young of the Law Offices of Iain A.
28 Macdonald appeared with defendant Brooks H. Haden.

EXHIBIT D

JUDGMENT
960973 Judgment

ENTERED APR 28 1998

COPY

1 After hearing the evidence and arguments of counsel, judgment is hereby
2 entered in this action against debtor and defendant Brooks H. Haden ("Haden") in favor of
3 plaintiff Ireta Irby ("Irby") determining that Irby's Judgment against Haden, entered on
4 November 17, 1988, in the United States District Court for the Southern District of Texas,
5 Civil Action No. H-88-1781, is deemed nondischargeable pursuant to Bankruptcy Code
6 Section 523(a)(2)(A). Irby shall recover her costs of suit in the amount of \$685.20.

7 Dated: APR 27 1998

8
9 **ALAN JAROSLOVSKY**

10 ALAN JAROSLOVSKY
11 United States Bankruptcy Judge
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PROOF OF SERVICE


I, the undersigned, declare as follows:

I am over the age of 18 years, and not a party to this action. My business address is 505 Montgomery Street, Suite 1550, San Francisco, California 94111. I am readily familiar with the business practice at my place of business for collection and processing of correspondence for mailing with the United States Postal Service. Correspondence so collected and processed is deposited with the United States Postal Service that same day in the ordinary course of business. On this date, at San Francisco, California, I served the following document(s), entitled JUDGMENT, by placing copies of said document(s) in sealed envelopes and served in the manner(s) described below on the addressee(s) listed below.

- ☒ (By Mail) I placed such envelope(s) for collection and mailing at my employer's San Francisco office following ordinary business practices, addressed to the addressee(s) designated.
- ☐ (By Federal Express) I caused such envelope(s) to be delivered by Federal Express overnight courier to the addressee(s) designated.
- ☐ (By Hand Delivery) I caused such envelope(s) to be delivered by hand to the addressee(s) designated.
- ☐ (By Facsimile) I transmitted copies of the referenced document(s) via facsimile to the telephone number(s) of the addressee(s) designated.

Iain A. Macdonald, Esq.
Law Offices of Iain A. Macdonald
Two Embarcadero Center, Suite 1670
San Francisco, CA 94111-3930

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct. Executed on April 20, 1998, in San Francisco, California.


Béla Nuss

PROOF OF SERVICE

I, the undersigned, declare as follows:

I am over the age of 18 years, and not a party to this action. My business address is 505 Montgomery Street, Suite 1550, San Francisco, California 94111. I am readily familiar with the business practice at my place of business for collection and processing of correspondence for mailing with the United States Postal Service. Correspondence so collected and processed is deposited with the United States Postal Service that same day in the ordinary course of business. On this date, at San Francisco, California, I served the following document(s), entitled **NOTICE OF ENTRY OF JUDGMENT**, by placing copies of said document(s) in sealed envelopes and served in the manner(s) described below on the addressee(s) listed below.

- ☒ (By Mail) I placed such envelope(s) for collection and mailing at my employer's San Francisco office following ordinary business practices, addressed to the addressee(s) designated.
- ☐ (By Federal Express) I caused such envelope(s) to be delivered by Federal Express overnight courier to the addressee(s) designated.
- ☐ (By Hand Delivery) I caused such envelope(s) to be delivered by hand to the addressee(s) designated.
- ☐ (By Facsimile) I transmitted copies of the referenced document(s) via facsimile to the telephone number(s) of the addressee(s) designated.

Iain A. Macdonald, Esq.
Law Offices of Iain A. Macdonald
Two Embarcadero Center, Suite 1670
San Francisco, CA 94111-3930

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct. Executed on April 29, 1998, in San Francisco, California.


Barak Weinstein

EXHIBIT E

EXHIBIT E

COPY

1 LAW OFFICES OF IAIN A. MACDONALD

Iain A. Macdonald, CSB# 51073

2 Kaipo K.B. Young, CSB #164718

Two Embarcadero Center, Suite 1670

3 San Francisco, CA 94111-3930

Telephone: (415) 362-0449

4 Facsimile: (415) 394-5544

5 Attorneys for Brooks H. Henderson, Defendant

97-1034 -AJ

APPEAL

DEBTOR: Brooks Haden

JUDGE: Hon. R. Jaroslowsky

MOTION: -

ORIGINAL FILED 05/05/98 - 11:47AM

CLERK, U.S. BANKRUPTCY COURT

NORTHERN DISTRICT OF CALIFORNIA

SANTA ROSA DIVISION

DEPUTY: ba

RECEIPT NO: 1-8-242822 \$105



6 UNITED STATES BANKRUPTCY APPELLATE PANEL

7 NINTH CIRCUIT COURT OF APPEALS

10 In re

11 BROOKS HENDERSON HADEN

12 Debtor.

14 IRETA IRBY

15 Plaintiff.

16 vs.

17 BROOKS HENDERSON HADEN

18 Defendant.

Chapter 7

Underlying Case No. 96-13933

Adversary Proceeding

No. 97-1034-AJ

NOTICE OF APPEAL

20 Defendant Brooks Henderson Haden ("Haden") hereby appeals under 28 U.S.C.
21 Section 158(b) to the United States Bankruptcy Appellate Panel from the Judgment After
22 Remand entered on April 28, 1998, a true and correct copy of which is attached hereto and
23 incorporated herein by this reference and herein marked as Exhibit "A".

24 The parties to the matter appealed from, and the names and addresses of their
25 attorneys are:

26 ///

27 ///

28 NOTICE OF APPEAL

G:\WPDOCS\1270-IAM\APPEAL\notice.wpd

1 Counsel for Defendant Brooks Henderson Haden:

2 Law Offices of Iain A. Macdonald

3 Iain A. Macdonald, Esq.

4 Kaipo K.B. Young, Esq.

5 Two Embarcadero Center, Suite 1670

6 San Francisco, CA 94111

7 Counsel for Plaintiff Ireta Irby:

8 Lofton, De Lencie & Nelson

9 Rhonda Nelson, Esq.

10 505 Montgomery Street

11 Suite 1550

12 San Francisco, CA 94111-2584

13 DATED: May 1, 1998

14 LAW OFFICES OF IAIN A. MACDONALD

15 By: 

16 Kaipo K.B. Young,

17 Attorneys for Defendant

18 Brooks Henderson Haden

1 LOFTON, De LANCIE & NELSON
 2 NICOLAS De LANCIE (State Bar No. 84934)
 3 RHONDA L. NELSON (State Bar No. 116043)
 4 505 Montgomery Street, Suite 1550
 5 San Francisco, California 94111-2584
 6 Telephone: (415) 772-1900

ORIGINAL FILED

APR 27 1998

7 Attorneys for Plaintiff
 8 IRETA IRBY

KEENAN G. CASADY, CLERK
 U.S. Bankruptcy Court-Santa Rosa

9 UNITED STATES BANKRUPTCY COURT
 10 NORTHERN DISTRICT OF CALIFORNIA
 11 SANTA ROSA DIVISION

12 In re

Case No. 96-13933 AJ
 Chapter 7

13 BROOKS H. HADEN,

14 Debtor.

15 IRETA IRBY,

Adversary No. 97-1034-AJ

16 Plaintiff,

17 v.

18 BROOKS H. HADEN,

19 Defendant.

20 JUDGMENT

21
 22
 23
 24 This action came on regularly for trial on April 14, 1998, in the United States
 25 Bankruptcy Court for the Northern District of California, Santa Rosa Division, the Honorable
 26 Alan Jaroslovsky presiding. Rhonda L. Nelson of Lofton, De Lancie & Nelson appeared with
 27 plaintiff Ireta Irby. Iain A. Macdonald and Kaipo K.B. Young of the Law Offices of Iain A.
 28 Macdonald appeared with defendant Brooks H. Haden.

JUDGMENT
 000000-000000

ENTERED APR 28 1998

Page 1

EXHIBIT A

COPY

1 After hearing the evidence and arguments of counsel, judgment is hereby
2 entered in this action against debtor and defendant Brooks H. Haden ("Haden") in favor of
3 plaintiff Ireta Irby ("Irby") determining that Irby's Judgment against Haden, entered on
4 November 17, 1988, in the United States District Court for the Southern District of Texas,
5 Civil Action No. H-88-1781, is deemed nondischargeable pursuant to Bankruptcy Code
6 Section 523(a)(2)(A). Irby shall recover her costs of suit in the amount of \$685.20.

7 Dated: APR 27 1998

8
9 ALAN JAROSLOVSKY

10 ALAN JAROSLOVSKY
11 United States Bankruptcy Judge
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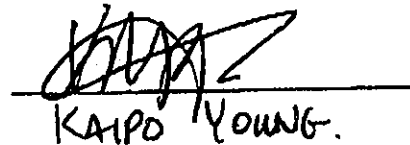
CERTIFICATE OF MAILING

I, the undersigned, state that I am employed in the City and County of San Francisco, State of California, in the office of a member of the bar of this Court, at whose direction the service was made; that I am over the age of eighteen years and not a party to the within action; that my business address is Two Embarcadero Center, Suite 1670, San Francisco, California 94111-3930; that on the date set out below, I hand delivered a copy of the within:

NOTICE OF APPEAL

on the party listed below.

I declare under penalty of perjury of the laws of the State of California, that the foregoing is true and correct. Executed at San Francisco, California, on May 1, 1998.


KAIPO YOUNG.

Rhonda Nelson, Esq.
Lofton, De Lancie & Nelson,
505 Montgomery Street
Suite 1550
San Francisco, CA 94111-2584

EXHIBIT F

EXHIBIT F

1 RHONDA L. NELSON (State Bar No. 116043)
2 SEVERSON & WERSON
3 A Professional Corporation
4 One Embarcadero Center, Suite 2600
5 San Francisco, CA 94111
6 Telephone: (415) 398-3344
7 Facsimile: (415) 956-0439

8 Attorneys for Plaintiff
9 IRETA IRBY

10 UNITED STATES BANKRUPTCY APPELLATE PANEL
11 NINTH CIRCUIT COURT OF APPEALS

12 In re
13 BROOKS HENDERSON HADEN,
14 Debtor,
15 IRETA IRBY,
16 Plaintiff,
17 vs.
18 BROOKS HENDERSON HADEN,
19 Defendant.
20

Chapter 7
Underlying Case No. 96-13933
Adversary Proceeding
No. 97-1034-AJ

PLAINTIFF IRETA IRBY'S
STATEMENT OF ELECTION TO
TRANSFER THE APPEAL TO THE
DISTRICT COURT

21 Ireta Irby objects to the referral of the above appeal to the Bankruptcy Appellate Panel and
22 therefore elects to transfer the appeal to the District Court.

23 ///

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PLAINTIFF'S IRBY'S STMT OF ELECTION
TO TRANSFER APPEAL TO DISTRICT CT.

RECEIVED
NANCY B. DICKERSON, CLERK
U.S. BKCY. APP. PANEL
OF THE NINTH CIRCUIT

MAY 27 1998

FILED 5-27-98
DOCKETED 5-28-98
DATE INITIAL

1 DATED: May 20, 1998

2 SEVERSON & WERSON
3 A Professional Corporation

4 By: 
5 Rhonda L. Nelson

6 Attorneys for Plaintiff
7 IRETA IRBY
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CERTIFICATE OF SERVICE

I, the undersigned, declare that I am over the age of 18 and am not a party to this action. I am employed in the City and County of San Francisco, California; my business address is Severson & Werson, One Embarcadero Center, Suite 2500, San Francisco, CA 94111.

On the date below I served a copy, with all exhibits, of the following document(s):

PLAINTIFF IRETA IRBY'S STATEMENT OF ELECTION TO TRANSFER THE APPEAL TO THE DISTRICT COURT

on all interested parties in said case addressed as follows:

Iain A. MacDonald, Esq.
Law Offices of Iain A. MacDonald
Two Embarcadero Center, Ste. 1670
San Francisco, CA 94111

Office of the U.S. Trustee
250 Montgomery Street, Suite 1000
San Francisco, CA 94102

☒ (BY MAIL) I caused an envelope to be deposited in the mail at San Francisco, California, with postage thereon fully prepaid.

I am readily familiar with the firm's practice of collecting and processing correspondence for mailing. On the same day that correspondence is placed for collection and mailing, it is deposited in the ordinary course of business with the United States Postal Service in San Francisco, California in sealed envelopes with postage fully prepaid.

I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct. This declaration is executed in San Francisco, California, on May 26, 1998.

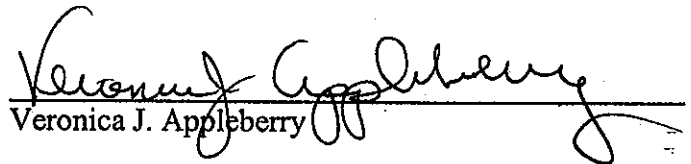

Veronica J. Appleberry

EXHIBIT G

EXHIBIT G

FILED

NOV 17 1998

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

RICHARD W. WIEKING
CLERK, U.S. DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

In re

BROOKS HENDERSON HADEN,
Debtor.

No. C 98-3011 FMS

ORDER AFFIRMING
DECISION OF THE
BANKRUPTCY COURT

BROOKS HENDERSON HADEN,
Appellant,

vs.

IRETA IRBY,
Appellee.

INTRODUCTION

Appellant and debtor, Brooks Henderson Haden, filed this appeal challenging the decision of the United States Bankruptcy Court for the Northern District of California. The bankruptcy court found that the claim of appellee, Ireta Irby, was excepted from discharge in bankruptcy on the basis of fraud. Two issues are raised on appeal: (1) whether the bankruptcy court erred when, based on its findings of fact, the court concluded that Haden fraudulently intended to deceive Irby; and (2) whether the bankruptcy court committed clear error when it found that Irby relied on Haden's misrepresentations. The Memorandum of Decision of the Bankruptcy Court is AFFIRMED.

//

BACKGROUND

This appeal arises out of Haden's failure to repay Irby a loan of \$75,000. During the relevant time period, appellant Haden was twenty-three years old and had recently graduated from college. See Memorandum of Decision of U.S. Bankruptcy Judge Alan Jaroslovsky, filed April 15, 1998 ("Mem. of Dec.") at 1. Appellee Irby was a registered nurse in her fifties. See id. Haden and Irby met through Irby's daughter, whom Haden was dating at the time. See id.

In early 1987, a third party convinced Haden that he could make money by investing in a number of business ventures. See Mem. of Dec. at 1. Haden believed that he could raise the capital needed to invest in these various deals by "purchasing a publicly traded shell corporation, infusing the ventures into the corporation, and then borrowing money using the corporation's stock as collateral." Id.

In order to purchase the shell corporation Haden needed approximately \$200,000. See Mem. of Dec. at 1. He convinced Irby to lend him \$75,000, three-quarters of her savings. See id. at 1-2. Haden told Irby that he only needed to borrow the money for ninety days and that he would repay her as soon as a commercial lender provided capital. See id. at 2. In fact, no bank would issue a loan to Haden and he lost all the money that had been lent to him, including Irby's \$75,000. See id. Haden never repaid Irby's loan. See id.

In 1988 Irby obtained an \$87,000 judgment against Haden. See Mem. of Dec. at 2; Transcript of Trial Proceedings

1 before the Honorable Alan Jaroslovsky, United States Bankruptcy
2 Judge, April 14, 1998 ("Tr.") at 107. The judgment was never
3 satisfied, and on November 14, 1996, Haden filed a Chapter 7
4 bankruptcy petition. See Mem. of Dec. at 2. Irby then filed an
5 adversary proceeding against Haden, seeking to have the debt owed
6 to her declared nondischargeable in bankruptcy, pursuant to 42
7 U.S.C. § 523(a)(2)(A).

8 The trial of this matter commenced on April 14, 1998,
9 before the Honorable Alan Jaroslovsky, United States Bankruptcy
10 Judge. See Tr. at 4. On April 15, 1998, Judge Jaroslovsky filed
11 a Memorandum of Decision, finding in favor of Irby and declaring
12 the judgment against Haden to be nondischargeable pursuant to 11
13 U.S.C. § 523(a)(2)(A). See Mem. of Dec. at 3.

14 The bankruptcy court found that Irby was "completely
15 unsophisticated in investment matters," Mem. of Dec. at 2, and
16 that "[d]espite being old enough to know better, she was taken in
17 by Haden's apparent polish and sophistication despite his young
18 age." Id.

19 The bankruptcy court also found that in order to
20 convince Irby to lend him the money, Haden misrepresented the
21 risk involved in the investment. See Mem. of Dec. at 3.
22 According to the court, Haden told Irby that "her loan was
23 absolutely safe, and [she] would be quickly repaid." Mem. of
24 Dec. at 2. Haden also told Irby the "very worst scenario was
25 that she would get her principal back and make no profit." Id.
26 The court determined that, although Haden did not set out to
27 cheat Irby at the time he guaranteed that the loan was risk free,
28

1 he knew that Irby "would not even get her principal back if a
2 bank would not loan on the corporate stock." *Id.* at 2-3.
3 Finally, the court found that Irby believed Haden when he told
4 her that the loan was "absolutely safe" and that "[i]f Irby had
5 known the true risks she would not have loaned the money." *Id.*

6 The court concluded that, "[g]ood intentions do not
7 excuse material misrepresentations, nor do they prohibit an [sic]
8 finding of intent to defraud. Haden used a falsehood to induce
9 Irby to loan him \$75,000.00. The court can and does infer
10 fraudulent intent from this act, despite Haden's motivations."
11 *Mem. of Dec.* at 3. Accordingly, the bankruptcy court decided
12 that Haden's debt to Irby was not dischargeable in bankruptcy
13 under 42 U.S.C. § 523(a)(2)(A).

14 Haden timely filed an appeal from this decision to the
15 Bankruptcy Appellate Panel. Pursuant to 28 U.S.C. §
16 158(c)(1)(B), Irby elected to transfer the appeal to the District
17 Court for the Northern District of California.

18 DISCUSSION

19 I. Legal Standard

20 - Bankruptcy court findings are reviewed for clear error
21 and conclusions of law are reviewed *de novo*. See *Anastas v.*
22 *American Sav. Bank (In re Anastas)*, 94 F.3d 1280, 1283 (9th Cir.
23 1996); *Robertson v. Peters (In re Weisman)*, 5 F.3d 417, 419 (9th
24 Cir. 1993). A factual finding is clearly erroneous if, after
25 examining the evidence, the reviewing court "'on the entire
26 evidence is left with the definite and firm conviction that a
27 mistake has been committed.'" *Anderson v. City of Bessemer*, 470
28

1 U.S. 564, 573 (1985) (quoting United States v. U.S. Gypsum Co.,
2 333 U.S. 364, 395 (1948)).

3 II. Analysis

4 Debts obtained by false representations are not
5 excepted from discharge under the Bankruptcy Code. See 11 U.S.C.
6 § 523(a)(2). Title 11, United States Code section 523 provides
7 in pertinent part: "A discharge under [various sections] of this
8 title does not discharge an individual debtor from any debt . . .
9 for money . . . to the extent obtained by . . . false pretenses,
10 a false representation, or actual fraud" 11 U.S.C. §
11 523(a)(2)(A) (Supp. 1998).

12 The Ninth Circuit has articulated a five-part test for
13 determining when a debt is nondischargeable under section
14 523(a)(2)(A). See Britton v. Price (In re Britton), 950 F.2d
15 602, 604 (9th Cir. 1991). According to Britton the creditor must
16 show that: (1) the debtor made representations to the creditor;
17 (2) at the time the representations were made, the debtor knew
18 they were false; (3) the debtor made the representations with the
19 "intention and purpose of deceiving the creditor"; (4) the
20 creditor relied on the representations; and (5) the creditor
21 sustained damages as a result of the representations having been
22 made. Id. "These requirements mirror the elements of common law
23 fraud" American Express Travel Related Servs. Co. v.
24 Hashemi (In re Hashemi), 104 F.3d 1122, 1125 (9th Cir.), cert.
25 denied, 117 S. Ct. 1864 (1997).

26 On appeal, Haden challenges the bankruptcy court's
27 conclusion that the debt is nondischargeable based on its factual
28

1 findings regarding Haden's intent. Haden also challenges the
2 court's factual finding that Irby relied on Haden's
3 representations.

4 **A. Intent To Deceive**

5 Haden contends that the bankruptcy court's factual
6 findings do not support the conclusion that his representations
7 to Irby were made with the "intention and purpose of deceiving"
8 her. See Britton, 950 F.2d at 604. Haden asserts that because
9 the bankruptcy court specifically found that (1) he did not set
10 out to cheat Irby, (2) that he fully intended to repay her, and
11 (3) that "[i]f the entire plan was a scam, [he] was a dupe, not a
12 perpetrator," Mem. of Dec. at 2-3, the court erred when it
13 concluded that the intent element of the Britton test was met.
14 Although the existence of intent is a factual finding subject to
15 the clearly erroneous standard of review, because Haden's
16 argument is that the finding of intent to deceive is logically
17 inconsistent with the bankruptcy court's other factual
18 determinations, not that it is unsupported by the record, the
19 Court reviews the decision de novo.

20 - "[A]ctual fraud, by definition, consists of any
21 deceit . . . involving direct and active operation of the mind,
22 used to circumvent and cheat another -- something said . . . with
23 the design of perpetrating what is known to be a cheat or
24 deception." RecoverEdge L.P. v. Pentecost, 44 F.3d 1284, 1293
25 (9th Cir. 1995) (quoting 3 Collier on Bankruptcy ¶ 523.08[5], at
26 523-57 to 523-58). A fraudulent misrepresentation is defined as:
27 "'One who fraudulently makes a misrepresentation of fact . . .
28

1 for the purpose of inducing another to act . . . in reliance upon
 2 it" Citibank (South Dakota), N.A. v. Eashai, 87 F.3d
 3 1082, 1086 n.3 (9th Cir. 1996) (quoting Restatement (Second) of
 4 Torts § 525 (1976)).

5 In this case, the bankruptcy court found that Haden
 6 promised Irby that her principal would be returned to her. See
 7 Mem. of Dec. at 2. The court also determined that Haden made
 8 this promise knowing that if a commercial lender failed to
 9 provide a loan on the corporate stock, he would not be able to
 10 pay her back. See id. at 3. In sum, the bankruptcy court found
 11 that Haden misrepresented the degree of risk involved in lending
 12 the money in order to persuade Irby to make the loan. See id. at
 13 2-3. These factual findings are consistent with the conclusion
 14 that Haden intended to deceive Irby.

15 The fact that Haden did not set out to cheat Irby, and
 16 that he fully intended to repay her, although admirable, is
 17 irrelevant to the finding of fraudulent intent. As the Supreme
 18 Court noted:

19 [T]he intent which must be established need not be an
 20 intent to cause injury to the [appellee] [I]t
 21 is not necessary that the person making the
 22 misrepresentations intend to cause loss to the other or
 23 gain a profit for himself; it is only necessary that he
 24 intend action in reliance on the truth of his
 representations. . . . [T]he fact that the defendant
 was disinterested, that he had the best motives, and
 that he thought he was doing the plaintiff a kindness,
 will not absolve him from liability so long as he did
 in fact intend to mislead.

25 S.E.C. v. Capital Gains Research Bureau, Inc., 375 U.S. 180, 192
 26 n.39 (1963) (quotations and internal citations omitted); accord
 27 Federal Sav. & Loan Ins. Corp. v. Musacchio, 695 F. Supp. 1053,
 28

1 1070 (N.D. Cal. 1988) (intent to cause injury is not required in
 2 order to satisfy the third prong of the test articulated in
 3 Britton). Haden's intent to repay Irby does not change the fact
 4 that he affirmatively misrepresented the risk involved in the
 5 transaction in order to induce her to lend him the money.

6 Finally, Haden's reliance on North American Coin is
 7 misplaced. See Torres v. Eastlick (In re North Am. Coin &
 8 Currency, Ltd.), 767 F.2d 1573 (9th Cir.), modified on other
 9 grounds, 774 F.2d 1390 (9th Cir. 1985). Haden relies on North
 10 American Coin to support his argument that "Irby's claim for
 11 fraud must go beyond the failure to disclose a contingency that
 12 Haden did not believe would happen." See Appellant's Opening Br.
 13 at 6. At issue in North American Coin was whether, in the
 14 absence of a material affirmative misrepresentation, defendant's
 15 failure to disclose amounted to fraud. See id. at 1576. The
 16 court held that it did not. See id. At issue here is whether
 17 Haden, through his affirmative misrepresentation, intended to
 18 deceive Irby.¹ The bankruptcy court did not commit error when it
 19 found that Haden intended to deceive Irby.

20 - //

21
 22 ¹ The two situations are distinguishable. See North Am.
 23 Coin, 767 F.2d at 1576. Before reaching the issue of when an
 omission constitutes an affirmative misrepresentation, the North
 24 American Coin court stated:

25 We do not find in this record . . . evidence to establish
 26 fraud. The plaintiffs do not contend, nor is there any
 evidence, that [defendant] committed any affirmative
 27 misrepresentations that induced them to do business with
 the company before it became insolvent. [Plaintiffs] were
 never promised that any special measures would be taken
 to protect their investments.

28 Id. Here, Haden affirmatively misrepresented the risk.

1 B. Reliance On The Misrepresentations

2 In order to except a debt from discharge under section
 3 523(a)(2)(a) a creditor's reliance need only be justifiable, not
 4 reasonable. See Field v. Mans, ___ U.S. ___, 116 S. Ct. 437, 445-
 5 46 (1995). According to the Ninth Circuit: "The general rule is
 6 that a person may justifiably rely on a representation even if
 7 the falsity could have been ascertained upon
 8 investigation. . . ." Romesh Japra, M.D., F.A.C.C., Inc. v. Apte
 9 (In re Apte), 180 B.R. 223, 229 (9th Cir. BAP 1995). A person
 10 cannot, however, rely on a representation knowing that the
 11 representation is false or if the falsity of the statement is
 12 obvious. See Eugene Parks Law Corp. Defined Benefit Pension Plan
 13 v. Kirsh (In re Kirsh), 973 F.2d 1454, 1458 (9th Cir. 1992). In
 14 determining whether a creditor justifiably relied on the
 15 representations of the debtor, it is necessary to look at all the
 16 circumstances surrounding the transaction and "particularly [to]
 17 consider the subjective effect of those circumstances upon the
 18 creditor." Id. at 1460.

19 Turning to the record in this case, the bankruptcy
 20 court's finding that Irby relied on Haden's misrepresentation was
 21 not clearly erroneous. Prior to lending Haden the \$75,000,
 22 Irby's only other experience in investing was the purchase of
 23 Certificates of Deposit. See Tr. at 78. She had never invested
 24 in the stock market or in mutual funds. See id. Irby testified
 25 that Haden "seemed very sophisticated". Id. at 79. She
 26 discussed the fact that Haden had attended college at SMU and had
 27 been an Oxford scholar. See id. at 80. Finally, Irby testified
 28

1 that Haden was the regional manager of a company and "made good
2 money." See id. at 79, 80.

3 Irby stated that in deciding to lend Haden the money,
4 she relied on his promises that she would get her money back in
5 ninety days, "that the very worst scenario would be
6 that . . . the deal would not go through," and that only ninety
7 days of interest on the CDS would be lost. Tr. at 87. In
8 addition, prior to lending Haden the money, the only other
9 information that Irby could recall receiving about the deal was a
10 number of brochures, apparently describing the companies that
11 Haden had been dealing with in Germany. See id. at 86-87. In
12 view of this record, the bankruptcy court's finding that Irby
13 relied on Haden's assurances was not clearly erroneous.

14 Haden argues that Irby knew that his representations
15 regarding the risk of this investment were false and that Irby
16 did not justifiably rely on them. Haden points to Irby's
17 statements in the record, claiming that Irby "didn't think 90
18 days sounded realistic" and that "the whole payback arrangement
19 sounded more on a par of winning the lotto." See Appellant's
20 - Opening Brief at 8. Haden misconstrues what Irby stated in the
21 record. In her deposition, Irby stated that receiving a return
22 on her investment within ninety days seemed unrealistic and that
23 the type of return Haden discussed sounded like winning the
24 lottery. See Tr. at 112-13. Although Irby may have doubted the
25 immediacy and extent of the profit on her investment, such doubts
26 are not inconsistent with the conclusion that she justifiably
27 relied on Haden's guarantee that, at a minimum, her initial
28 -

1 investment would be returned to her.

2 After examining the evidence regarding Irby's reliance,
3 the Court is not left with "the definite and firm conviction that
4 a mistake has been committed." City of Bessemer, 470 U.S. at
5 573. The finding of the bankruptcy court was not clearly
6 erroneous.

7 **CONCLUSION**

8 For the foregoing reasons, the decision of the
9 bankruptcy court is AFFIRMED.

10
11
12 SO ORDERED.

13 Dated: November 16, 1998

14 
15
16 FERN M. SMITH
United States District Judge